SBC MEMORANDUM IN OPPOSITION
TO LEVEL 3'S FORBEARANCE PETITION
WC Docket No. 03-266
February 3, 2005

INTRODUCTION AND SUMMARY

Since the passage of the 1996 Act, the Commission has made considerable progress in intercarrier compensation reform because it has carefully heeded the close interrelationships among three key variables: access charges, universal service support, and end user rates. As discussed in the attached cover letter, the Commission now stands on the verge of a historic breakthrough. In a rare display of unity, a broad coalition of carriers, including both SBC and Level 3, has joined together in the Intercarrier Compensation Forum (ICF) to propose a far-sighted regime of comprehensive intercarrier compensation reform that takes each of these three critical variables fully into account.[1] If adopted, that regime would produce regulatory certainty and rationality over the long term to the benefit of the industry and consumers alike.

Against this backdrop, Level 3's petition stands as a regrettable effort to jump out ahead of this reform process by proposing a quick fix on a single variable of particular interest to Level 3 -- access charges on the PSTN side of IP-PSTN traffic -- without making any corresponding adjustments to many other closely related issues of intercarrier compensation and universal service.[2] If granted, Level 3's request would imperil the delicate spirit of compromise that underlies the ICF proposal and, more generally, would place an immense roadblock in the way

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[1] *See* Letter from Richard Cameron, counsel for ICF, to Marlene Dortch, FCC, CC Docket No. 01-92 (Oct. 5, 2004) (transmitting ICF plan).

[2] We use the term "IP-PSTN" to refer collectively to traffic flowing from IP networks to the PSTN as well as traffic flowing from the PSTN to IP networks. When we refer to a specific traffic flow, we use the terms "VoIP-to-PSTN" or "PSTN-to-VoIP."

of intercarrier compensation reform. The broader policy consequences of granting the piecemeal relief Level 3 seeks here could thus be most unfortunate. This is *not* to say that there should be no changes to the compensation rules for IP-PSTN traffic which, as SBC has previously explained, currently prescribe access charges on the PSTN end of an IP-PSTN call. But it *is* to say that such changes must be included within a comprehensive framework for the overall reform of intercarrier compensation, universal service, and end user charges.

This memorandum explains why basic legal considerations, as well as the Commission's own policy priorities, compel that same conclusion. As an initial matter, as SBC has explained before,[3/] access charges apply to IP-PSTN traffic today under the Commission's existing rules. And there is absolutely no merit to Level 3's arguments regarding the Commission's so-called enhanced service provider (ESP) exemption. That exemption is limited to an ESP's use of the PSTN to reach its *own subscriber* for the provision of an *information service*. It does not apply when an ESP (or its CLEC partner) uses the PSTN to reach a *non-subscriber* who receives a telecommunications service – which is exactly what happens in a VoIP-to-PSTN call.[4/] Rather

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[3/] *See* Opposition of SBC Communications, Inc., *Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266 (March 1, 2004) (SBC Opposition); Reply Comments of SBC Communications, Inc., *Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266 (March 31, 2004) (SBC Reply Comments). *See also* Comments of SBC Communications Inc., IP-Enabled Services, WC Docket No. 04-36, at 70-77 (May 28, 2004); Reply Comments of SBC Communications Inc., IP-Enabled Services, WC Docket No. 04-36, at 46-51 (July 14, 2004).

[4/] *See* SBC Opposition at 13-17; SBC Reply Comments at 7-10. Nor, in any event, would the ESP exemption apply to allow Level 3 to avoid access charges. From its inception, the ESP exemption has allowed ESPs only to purchase their access services in the form of business lines (typically PRIs) from LEC intrastate tariffs. But by its own admission, Level 3 is not acting as an ESP and is not seeking to purchase intrastate business lines. Rather, Level 3 is purporting to

than repeat these arguments in full, SBC respectfully refers the Commission to its prior filings. In this memorandum, SBC highlights several additional and independent reasons why granting Level 3's request would be arbitrary, capricious, and legally unsustainable.

First, Level 3 seeks to bypass the Commission's carefully calibrated efforts to reform intercarrier compensation by obtaining a quick, self-serving fix on *one* intercarrier compensation issue without the slightest regard for how such piecemeal relief would complicate resolution of all the *other* issues to which this one issue is inextricably tied. Because Level 3 seeks such relief in isolation, Level 3's petition risks upsetting the delicate balance of intercarrier compensation, universal service, and end-user rates that the Commission must maintain as it undertakes the difficult task of comprehensive reform.

Second, Level 3's proposed compensation regime would be blatantly asymmetrical and discriminatory. Level 3 proposes to eliminate access charges for VoIP-to-PSTN traffic, but where traffic is sent *from* the PSTN *to* a VoIP customer in a distant rate center or area code, Level 3's petition would allow it to continue to *receive* access charges. As a result, access charges would continue to flow *from* PSTN-based customers and IXCs *to* VoIP providers and their CLEC partners, such as Level 3 -- but never in the other direction. Perversely, PSTN customers and IXCs would thus subsidize the cost of VoIP service, creating massive, economically nonsensical arbitrage opportunities for VoIP providers and their CLEC partners.

Third, pervasive implementation problems would impair any regulatory solution to the facial defects of Level 3's proposal.

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be a CLEC and is attempting to send traffic over local interconnection trunks. Thus, however the Commission ultimately decides to construe its current ESP exemption, Level 3 is clearly not entitled to that exemption.

PSTN-to-VoIP Traffic. Level 3 itself concedes that there is no reliable means for an originating LEC, IXC or wireless provider to identify when traffic from the PSTN is destined for a VoIP customer.[5/] These carriers simply have no way to know when one of their customers has called a VoIP subscriber -- they only know that the call is bound for the network of another carrier who may (or may not) be serving a VoIP provider and its customers. And Level 3 proposes no mechanism for preventing carriers in this intercarrier compensation catbird seat from assessing access charges for all such traffic, even though, under Level 3's proposed regime, doing so would give rise to the irrational and legally unsustainable asymmetry described above. Thus, even if Level 3 formally amended its petition to eliminate that asymmetry, the asymmetry would persist as a practical matter if the petition were granted.

VoIP-to-PSTN Traffic. Implementing Level 3's proposal would create opportunities for massive fraud whenever carriers in Level 3's position hand off, to any terminating PSTN carrier, a mix of traffic, some of which is originated on IP networks and some on the PSTN. Level 3 and similarly situated carriers would have sole possession of the information needed -- if such information is available at all -- to distinguish between (i) calls that are PSTN-originated and thus subject to access charges and (ii) calls that are VoIP-originated and thus (under Level 3's proposal) immune from access charges. Industry experience has shown that such carriers have a huge incentive

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5/ *See* Presentation on Originating Line Information, attached to letter from John T. Nakahata, Counsel for Level 3 Communications, to Marlene H. Dortch, FCC, WC Docket Nos. 03-266 and 04-36, at 3 (filed Sep. 24, 2004).

to misidentify access traffic as non-access traffic,[6] especially where, as under Level 3's proposal, they have little fear of getting caught.

Rural Carve-Out. For related reasons, Level 3's putative "rural carve-out" offers small comfort to rural carriers, for there is no practical means of implementing it. Because rural carriers typically rely on non-rural ILECs for indirect interconnection with other carriers, most access traffic terminated to rural carriers is routed first through the access trunks of non-rural ILECs. If Level 3's petition is granted, Level 3 and similar carriers would avoid access charges by delivering their VoIP-originated traffic to the local interconnection trunks of those non-rural ILECs rather than their access trunks. There would be no mechanism -- and Level 3 certainly points to none -- for separating out any "access" traffic ultimately bound for the customers of rural ILECs and subjecting that traffic alone to access charges. Instead, all such traffic would be rated as local, and rural carriers would end up in the same position as non-rural ILECs: stripped of their ability to collect access charges.

Fourth, Level 3's proposal would imperil universal service and jeopardize the stability of the PSTN by abruptly eliminating access charges for IP-PSTN traffic without accounting for the implicit universal service support those charges contain. ILECs today are required to serve many customers at below-cost rates, and access charges (especially intrastate access charges) remain a key source of support for those customers. The Commission cannot rationally give Level 3 the

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[6] *See, e.g., State Telecom Activities*, Communications Daily (Jan. 24, 2005) ("A federal court awarded SBC Indiana $8.1 million in fraud damages against Tex.-based long distance carrier Thrifty Call for evading lawful carrier access charges."). *See also Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd 7457 (2004).

piecemeal relief it seeks without simultaneously creating a new mechanism to replace the support that would be eliminated if Level 3's petition were granted. That fundamental shortfall in Level 3's petition illustrates why the Commission should deny that petition and deal comprehensively with the full range of interrelated intercarrier compensation and universal service issues.[7]

Fifth, the relief Level 3 requests would arbitrarily create a regulation-based competitive disparity favoring VoIP providers over PSTN-based wireless and wireline carriers. If Level 3's petition is granted, those PSTN-based carriers would continue to bear, in the absence of comprehensive intercarrier compensation reform, access charge obligations when using the PSTN, whereas carriers in Level 3's position would be completely exempt from such obligations even though all of these carriers are using the PSTN for the same purposes. The Commission cannot lawfully help Level 3 and similar providers achieve that arbitrary competitive advantage. Indeed, once given this unfair advantage, providers like Level 3 would have strong incentives to maintain their advantage by opposing comprehensive intercarrier compensation reform.[8]

DISCUSSION

(1) Level 3's Petition Disrupts Efforts to Reform Intercarrier Compensation.

To fully comprehend the flaws in Level 3's petition, the Commission must first understand how Level 3's proposed relief would disrupt the Commission's overall efforts to

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[7] According to press reports, Level 3 has apparently submitted a study to the Commission that addresses the economic impacts of the relief that Level 3 requests. SBC will respond to that study once it becomes publicly available.

[8] By contrast, SBC, with its broad range of interests as a major local telephone company, large long distance carrier, joint owner of a wireless provider and a leading provider of VoIP services, would continue to have strong incentives to pursue comprehensive intercarrier compensation reform if Level 3's petition were denied.

reform access charges and universal service. In the 1996 Act, Congress sought to provide a "pro-competitive, deregulatory national policy framework" that would "open all telecommunications markets to competition."[9] But Congress recognized that introducing competition into the telecommunications marketplace would also require comprehensive access charge and universal service reform. To assist the Commission, Congress provided guidance for how these reforms should be conducted. Among other things, Congress specified that universal service support should be "explicit."[10] Congress also preserved the preexisting access charge regime, including the ILECs' rights to receive access charges, unless and until that regime is superseded through the Commission's reform efforts.[11]

Since the passage of the 1996 Act, the Commission and the communications industry have spent substantial time and resources to conduct these reform efforts in a fair, coordinated, and comprehensive manner. By proceeding in this measured fashion, the Commission and the industry have made significant strides in removing implicit support from interstate access charges, creating explicit universal service support mechanisms to replace implicit interstate subsidies, and introducing competition to the marketplace -- all while boosting telephone subscription rates to the highest levels in our nation's history.[12]

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9 H.R. Rep. No. 104-458 (1996) (Joint Explanatory Statement of the Committee of the Conference on the Telecommunications Act of 1996).

10 47 U.S.C. § 254(e).

11 47 U.S.C. § 251(g).

12 *See* SBC Opposition at 6-9.

This delicate balancing act has succeeded so far because the Commission has recognized that effective reform requires simultaneous attention to three key variables that affect the affordability of telecommunications service: (1) access charges; (2) universal service support; and (3) end-user rates. The Commission has wisely chosen not to focus on a single variable in isolation without contemporaneously addressing the impact of its decisions on the others.

And now, almost a decade after the Commission began its reform efforts, the Commission is tantalizingly close to achieving a true breakthrough that would, at long last, result in regulatory certainty and long-term intercarrier compensation stability for the communications industry and its consumers. The ICF companies, which include both SBC and Level 3, have come together to propose a comprehensive solution for the Commission's consideration. The ICF plan puts the industry on a path that unifies and reduces intercarrier compensation, eventually culminating in bill-and-keep for most of the industry. The plan shifts revenue from unsustainable intercarrier charges to end-user charges and to explicit universal service support as necessary to maintain affordable end user rates. The plan establishes default network interconnection rules that fairly apportion the costs associated with network interconnection between carriers. The plan further provides for fair and sustainable reform of the universal service contribution mechanism.

But inexplicably, with a comprehensive solution in reach, the Commission is apparently considering granting Level 3's petition -- a course of action that would undermine all of the tremendous progress made to date and would jeopardize the viability of the fragile cross-industry relationships that have made this progress possible. The Commission should resist the temptation to look for a quick fix by granting Level 3's petition and creating a new exemption from access charges for IP-PSTN services. Instead, the Commission should expedite its

forthcoming rulemaking on intercarrier compensation and should adopt the ICF proposal for comprehensive reform.

2. Level 3's Forbearance Request Would Result in an Arbitrary and Capricious Asymmetrical Intercarrier Compensation Regime for IP-PSTN Traffic that Would Drain Access Charges from the PSTN.

On its face, Level 3's request for forbearance does not extend to all access charges that might apply to IP-PSTN traffic. In particular, it omits any reference to the terminating access charges that may be imposed by carriers like Level 3, who serve VoIP providers, when an IXC delivers a VoIP-bound call that originated in a distant rate center on the PSTN. While Level 3 asks the Commission to "treat [IP-PSTN] traffic in a uniform manner,"[13/] the rules sought in the Level 3 petition would not produce this result. Instead, they would stop the flow of access charges to the PSTN from VoIP-originated calls, while allowing access charges to continue to flow from the PSTN to VoIP providers and their CLEC partners on VoIP-terminated calls. This patently asymmetrical result is directly contrary to the public interest and would be a net detriment for the PSTN and the hundreds of millions of ordinary consumers that rely on it for their basic communications needs.

To see how Level 3's proposed forbearance would create this asymmetry, consider the four basic scenarios for the exchange of VoIP traffic between the IP platform and the PSTN:

1. *A "local" VoIP-to-PSTN call.*[14/] In this scenario, a VoIP subscriber places a call to a traditional, circuit-switched (plain old telephone service, or "POTS") end user whose

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13/ Level 3 Petition at 47.

14/ SBC is aware that "local" and "long-distance" labels may not always be fully descriptive in this context, as the VoIP user may be physically located anywhere when he makes his call. Level 3 itself notes that VoIP communications are "divorced from geography." *See* Level 3 Petition at 18. For this and other reasons, the Commission has held that all VoIP traffic, and thus all IP-PSTN calls, are jurisdictionally mixed and will be treated as inseverably "interstate." *See*

phone number is associated with the same local calling area as the VoIP subscriber's phone number. For example, suppose that a Level 3 VoIP subscriber with a Chicago phone number (area code 312) calls an SBC POTS end user who is also physically located in Chicago and who thus also has a "312" number.[15/]

2. *A "long distance" VoIP-to-PSTN call*: In this scenario, the "312" Level 3 VoIP subscriber might call a POTS user served, for example, by SBC in Berkeley, CA (area code 510).

3. *A "local" PSTN-to-VoIP call*: Here, imagine that the SBC "312" POTS end user calls the "312" number of the Level 3 VoIP subscriber.

4. *A "long distance" PSTN-to-VoIP call*: In this final scenario, the "510" SBC POTS customer calls the Level 3 "312" VoIP subscriber.

Level 3's petition seeks to impose reciprocal compensation charges in scenarios 1, 2 and 3. As discussed below, however, the petition would leave Level 3 and other IP-PSTN interconnection carriers free to maintain access charges in scenario 4 -- the one IP-PSTN scenario in which those carriers stand to *gain* from the continued application of access charges to IP-PSTN traffic.

Vonage holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 04-267 ¶¶ 14 n.46, 17-18, 44 (released Nov. 12, 2004). The Commission expressly declined, however, to address the intercarrier compensation implications of its jurisdictional determination. *Id.* n.6, ¶ 44. Accordingly, the Commission's existing access charge rules, and SBC's existing tariffs, remain in effect unless and until the Commission changes those rules.

15/ Note that in each of these scenarios, it is irrelevant whether Level 3 actually provides the VoIP service or provides an IP-PSTN gateway connection to an independent VoIP provider such as Vonage. Under the Level 3 petition, there is no change in the scenarios or the result.

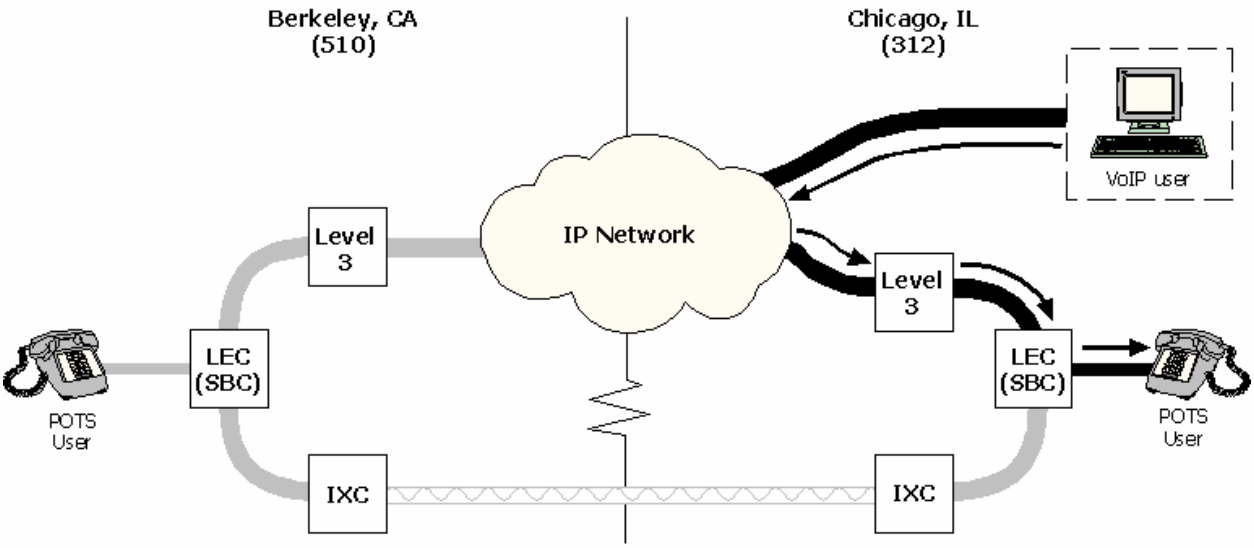

Figure 1: A "local" VoIP-to-PSTN call

Scenario 1: A "Local" VoIP-to-PSTN Call. In scenario 1 (Fig. 1), Level 3 converts the VoIP user's call into circuit-switched format and passes it to SBC in Chicago. SBC terminates the call to its customer. Level 3 proposes that this "312"-to-"312" VoIP-to-PSTN end user call be treated as a local call, whether or not the VoIP user is actually physically located in Chicago when the call is placed.[16/] Level 3 thus would pay SBC reciprocal compensation under Section 251(b)(5) of the Communications Act.[17/]

[16/] Level 3 Petition at 6 ("Level 3 requests forbearance with respect to traffic that is carried by a LEC on its side of the point of interconnection with . . . Level 3 and that . . . is terminated over the PSTN in circuit-switched format after having been transmitted from an end-user to an IP provider in IP format, and exchanged between the telecommunications carrier serving an IP service provider and the terminating LEC at a point of interconnection within the same LATA [local access and transportation area] as the called party.")

[17/] *Id.*; 47 U.S.C. § 251(b)(5).

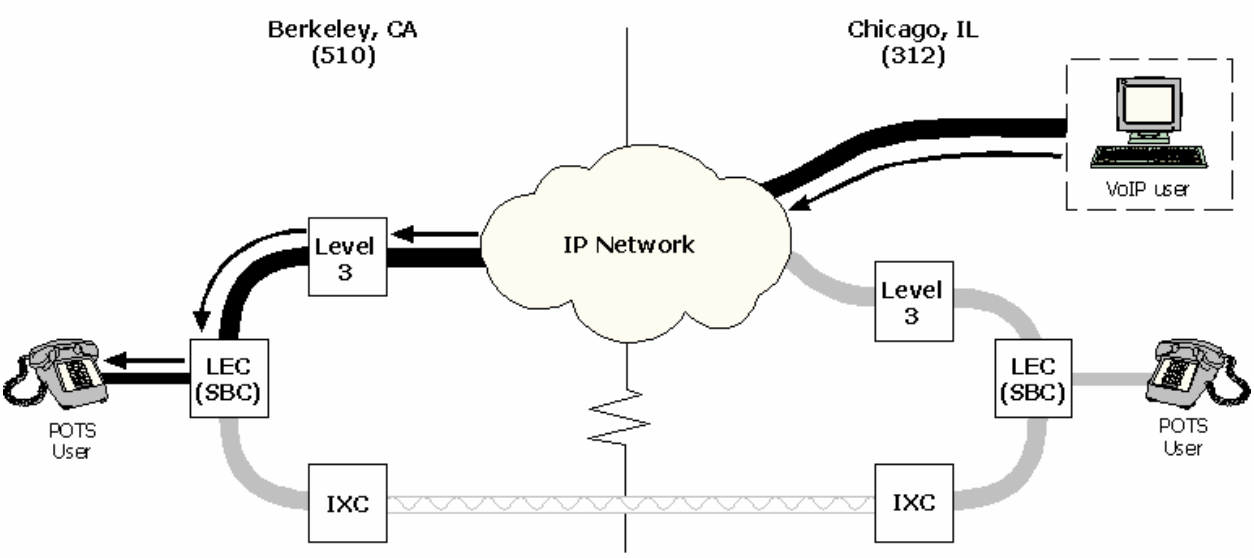

Figure 2: A "long-distance" VoIP-to-PSTN call

Scenario 2: A "Long-Distance" VoIP-to-PSTN Call. In scenario 2 (Fig. 2), a VoIP call from a calling party that has obtained a Chicago ("312") area code is dropped off at Level 3's gateway in California en route to the POTS end user in Berkeley. It is not entirely clear where the call physically originated, although there is a statistically good chance that it was from outside California. It also is not clear when the call left Level 3's IP network and was converted into a circuit-switched call traveling on Level 3's circuit-switched facilities. Regardless, Level 3's petition would treat this call as "local" traffic, so that Level 3 would pay only reciprocal compensation to SBC.[18/]

[18/] Level 3 Petition at 6.

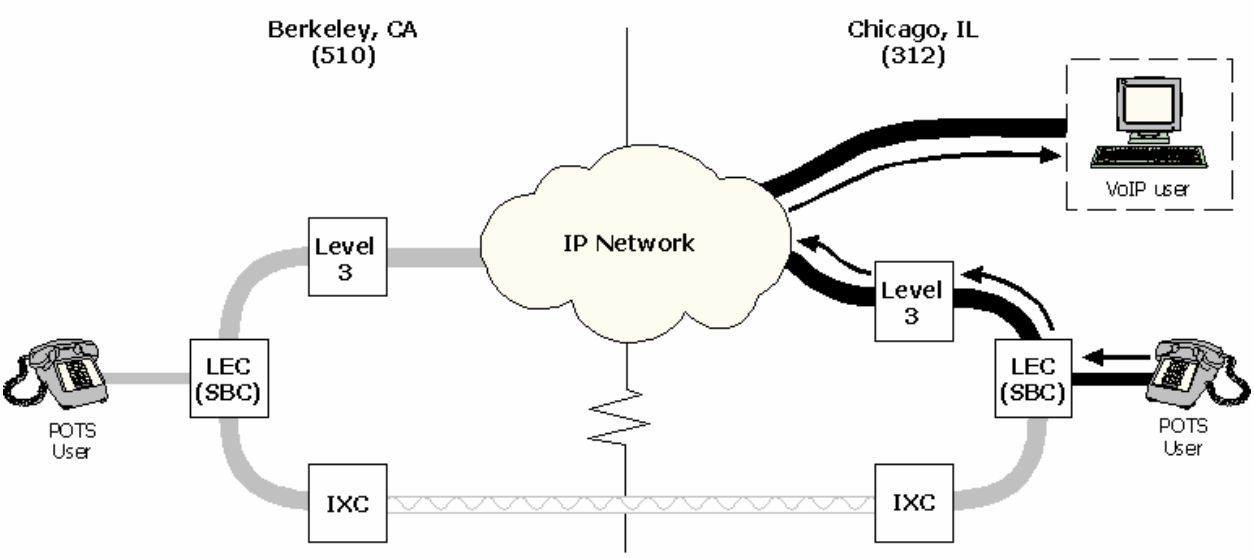

Figure 3: A "local" PTSN-to-VoIP call

Scenario 3: A "Local" PSTN-to-VoIP Call. In the third scenario, a "312" SBC POTS customer places a call over the PSTN to a number he or she—and SBC's switch—perceives as a "local" call in the sense that the called party (a VoIP subscriber) also has obtained a "312" number in the same local calling area. Here, too, the call might well be a long distance call in reality, given the geographic indeterminacy of IP addresses and the NANP numbers associated with them. Again, however, the Level 3 petition would treat this call as local, and would require SBC to pay reciprocal compensation to Level 3 in this scenario.[19/]

[19/] *Id.* at 6 ("Level 3 requests forbearance with respect to traffic that is carried by a LEC on its side of the point of interconnection with . . . Level 3 and that . . . originates on the PSTN within the same LATA of the point of interconnection between the LEC and the interconnected telecommunications carrier, and is passed to an end-user from an IP network provider in IP format.").

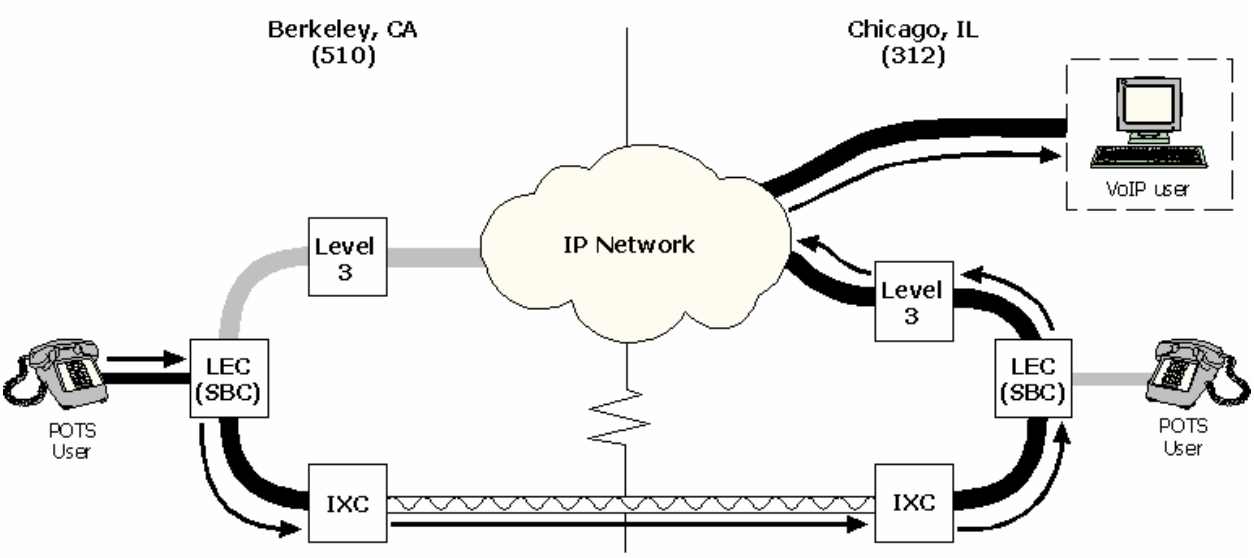

Figure 4: A "long-distance" PTSN-to-VoIP call

Scenario 4: A "Long-Distance" PSTN-to-VoIP Call. The fourth and final scenario drives home the striking arbitrariness that exists on the face of the forbearance sought by Level 3. In this scenario, when the SBC POTS end user in California dials the number of the "312" VoIP subscriber, the POTS end user would expect the call to be routed to its designated IXC as an interstate, long distance call and SBC would be required under its equal access obligations to route the call accordingly. The call is therefore handed off to the POTS end-user's designated IXC, which in turn carries the call over its long distance network from California to Illinois. In Chicago, the IXC typically will pass the call to an ILEC tandem access switch, and the ILEC will then hand that call off to Level 3.[20/] At that point, Level 3 converts the voice signals into IP packets and sends them onto an IP network, where a VoIP provider routes them to its subscriber.

The Level 3 petition ignores scenario 4. Indeed, in the single footnote in which Level 3 acknowledges this scenario, it notes only that the IXC would of course continue to pay

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20/ In theory, Level 3 or a similarly situated carrier could provide the tandem access itself.

originating access to the ILEC.[21/] But the petition is notably silent on whether the LEC *terminating* the call to the VoIP provider may also collect access charges from the IXC. Level 3 thus presumably hopes to go on collecting access charges from IXCs when they terminate calls from a POTS end user to a VoIP subscriber with a number in a distant area code or rate center. Level 3 and carriers in its position thus would enjoy an access charge windfall when terminating "long distance" PSTN-to-VoIP calls while simultaneously avoiding any need to *pay* access charges in any other scenario involving IP-PSTN traffic. Under this perverse arrangement, access charges designed to support the costs of the PSTN would instead flow *from* the PSTN to subsidize the costs of VoIP providers and their customers, but would never flow to the PSTN to pay for the cost of that network. This is a recipe for destabilization of the PSTN, especially as more and more traffic moves from the circuit-switched network to VoIP providers.

Adopting Level 3's asymmetrical regime -- *i.e.*, foreclosing access charges in scenarios 1, 2 and 3, while arbitrarily entitling Level 3 and other similar CLECs to the continued flow of access charges in scenario 4 -- would be senseless as a policy matter and untenable as a legal matter. To begin with, as we explain further in section 5, below, abruptly eliminating IP-PSTN-related access charge payments whenever those payments are made to support the PSTN would imperil ubiquitous and reliable PSTN service by draining away its essential support. This

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[21/] Level 3 Petition at 17 n.34 ("Calls destined for a number outside the LATA generally are carried over the calling party's presubscribed IXC. The calling party's presubscribed IXC pays access on the *origination* of such a call. Nothing in this petition would alter that obligation in the case of a dialed number that is associated with an exchange outside of the calling party's LATA.") (emphasis added). *See also* Letter from John T. Nakahata, Counsel for Level 3 Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-266 (filed Dec. 22, 2004) (purporting to resolve an ambiguity in Level 3's petition, but failing to address terminating access on a PSTN-to-VoIP call).

problem will grow increasingly severe over time as more and more traffic shifts from the PSTN to VoIP-based providers.[22/] And the asymmetry inherent in Level 3's petition will only exacerbate that trend and further destabilize the PSTN. Those VoIP providers who are playing by the rules and paying access charges today would cease paying access charges in the future. Further, obliging PSTN-based carriers and end users to pay terminating access to Level 3 and other such carriers will subsidize the costs of the VoIP providers whose new-found access charge exemption would already be undermining the PSTN if the Commission granted Level 3's petition. The net result would be the epitome of arbitrary and capricious decision-making.

The flow of access charges from the PSTN to IP networks would be bad enough even if CLECs had no means of making the problem worse by looking for new opportunities to exploit it. But, in fact, carriers would have every incentive to find such opportunities. For example, the carrier that terminates PSTN-to-VoIP "long distance" traffic would enjoy a clear advantage over any carrier that originates such traffic, because access charges under Level 3's approach may flow from PSTN carriers to VoIP providers and their CLEC partners but never in the opposite direction. That fact could lead to the same type of economically irrational arbitrage opportunity the Commission thought it had stamped out when it reduced reciprocal compensation rates for dial-up ISP-bound traffic, for which compensation flows were similarly unidirectional. Where an opportunity for arbitrage exists, moreover, the industry tends not to tarry long before it finds a means to exploit it. The result, again, would be discriminatory, inimical to the interests of consumers, and at war with the public interest.

22/ *See* SBC Opposition at 24-26.

It also would be especially unfair to require PSTN-based end users to foot the bill for access charges to support VoIP services given that VoIP providers have no entitlement under current law to collect access charges in the first place. Indeed, the Commission concluded that a CLEC may not charge for terminating access "*on behalf of*" a non-LEC provider that actually terminates a call where that non-LEC is not entitled to collect access charges itself.[23/] For example, the Commission ruled that where a CLEC accepts a long distance call from an IXC, and that call is destined for termination by a wireless carrier served by the CLEC, the CLEC cannot bill for terminating access charges on behalf of that wireless carrier, since the wireless carrier *itself* typically has no right to receive access charges.[24/]

Of course, to the extent that a CLEC is performing legitimate access functions for a non-LEC, the CLEC may collect access charges for the functions the CLEC actually provides (but not the full benchmark rate).[25] Indeed, the fact that CLECs are collecting access charges *today*

23/ *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, Petition of Z-Tel Communication, Inc., For Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, CC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9115 ¶ 16 (2004) (*Eighth Report and Order*) (emphasis added). For that reason alone, SBC would be more than justified in declining to pay access charges for traffic bound for a VoIP provider where a CLEC is seeking to impose access charges on behalf of the VoIP provider.

24/ *Id.* (ruling that, in the absence of a specific contract, "a competitive LEC has no right to collect access charges for the portion of the service provided by the CMRS provider"). *See generally Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316, Declaratory Ruling, 17 FCC Rcd 13192 (2002). Indeed, to the extent a VoIP end user obtains his or her VoIP service from a VoIP provider served by Level 3 and his or her broadband connectivity through an xDSL service offered by SBC, Level 3 appears to be seeking access charges *when SBC is the entity actually incurring the costs associated with terminating the call to the end-user customer*. That result would be patently absurd.

25 *Eighth Report and Order* ¶ 21.

for the legitimate functions they provide concerning PSTN-to-VoIP traffic, and would, as a practical matter, continue to collect those access charges in the future, should demonstrate to the Commission that a *symmetrical* obligation to pay access charges is an entirely reasonable and lawful result, pending further intercarrier compensation reform. If CLECs can continue to enjoy the economic benefits of collecting access charges for delivering PSTN-to-VoIP traffic to VoIP providers, then there is no reason to deny that same right to access charges to ILECs who terminate VoIP-to-PSTN traffic on their own networks. With such a symmetrical access charge regime in place for IP-PSTN traffic, all carriers (ILECs, CLECs, IXCs, and CMRS providers) would be put on equal footing and no provider would have an unfair opportunity to engage in regulatory arbitrage. Thus, the most equitable, responsible, and straightforward course of action for the Commission would be to deny Level 3's petition while re-affirming the symmetrical right to receive access charges for IP-PSTN traffic, pending comprehensive intercarrier compensation reform.

3. The Relief Level 3 Seeks Is Rife with Serious Implementation Problems.

Level 3's proposal that the Commission eliminate access charges for some types of IP-PSTN traffic in the context of a forbearance petition would raise a host of complex problems. Implementing the discrete relief Level 3 requests would require new, detailed rules with respect to how identify VoIP-to-PSTN and PSTN-to-VoIP calls so that they can be distinguished from other traffic; how to route such traffic to and from carriers on the PSTN; and how the carriers involved in that routing should compensate one another. Leaving aside whether effective rules could even be designed, a forbearance proceeding is not the vehicle for that task. Indeed, the Level 3 petition does not even address the details of implementing the relief it seeks, which would require an informed, administrative rulemaking process. But the implementation

problems here are so severe and intractable -- with so much opportunity for fraud and abuse -- that they present an insurmountable barrier to Level 3's forbearance request.

PSTN-to-VoIP Traffic. A serious implementation problem arises with respect to PSTN-originated traffic bound for VoIP subscribers: there is currently no feasible way to identify that traffic. Indeed, Level 3 does not even try to suggest a means for identifying PSTN-to-VoIP calls. In fact, it acknowledges that *no means whatsoever* exists today for an originating carrier to identify PSTN-to-VoIP calls, since originating carriers have no way of knowing that any particular call will ultimately terminate to a VoIP subscriber.[26] As a result, even if the Commission sought to close the legally indefensible access charge loophole described in section 2 above by formally prohibiting Level 3 (and similar carriers) from collecting terminating access charges for *all* PSTN-to-VoIP traffic, implementation problems would keep that loophole open as a *practical* matter. IXCs and wireless carriers, who terminate PSTN-originated traffic to CLECs serving VoIP providers, would find it exceptionally costly and difficult to distinguish PSTN-to-VoIP traffic destined for such a CLEC from ordinary PSTN-to-PSTN traffic destined for that CLEC.[27] And Level 3 proposes no mechanism for keeping carriers in its position from assessing access charges for all such traffic, or from *underreporting* the percentage of such traffic that is VoIP-bound in order to collect more access charges, which they would certainly have an incentive to do if Level 3's petition were granted.

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[26] *Id.* at 3.

[27] Similarly, Level 3 proposes no means by which the originating LEC could identify the call as VoIP-bound and therefore route it as a "local" call rather than an "access" call -- a question that is especially thorny where the call is bound for a distant area code and would normally be handed off to the end user's presubscribed IXC.

VoIP-to-PSTN Traffic. A similar implementation problem arises with Level 3's proposal for VoIP-to-PSTN traffic: no mechanism for identifying and distinguishing such traffic has been devised and implemented. The only mechanism that Level 3 has even proposed -- the so-called "OLI parameter" -- is untested and is highly susceptible to manipulation. Indeed, the industry has only just begun meeting on the feasibility of using the OLI parameter for this purpose, and there is no consensus that it will work.[28] And even if it can be made to work someday, there are indisputably no rules governing its use now. Until the Commission has adopted a full set of rules concerning the OLI parameter, therefore, LECs would have no option but to rely on Level 3 and similarly situated carriers to distinguish VoIP-originated calls from PSTN-originated calls. That is a situation fraught with the opportunity for fraud. Consider the case of VoIP-originated traffic. If Level 3's petition were granted, those carriers with the exclusive access to the information concerning whether a particular call is VoIP-originated or not would have a powerful economic incentive to overclassify traffic as being VoIP-originated and thus subject to reciprocal compensation rather than access charges. To make matters worse, given that VoIP traffic is by all reports growing rapidly, it would be nearly impossible for terminating LECs to judge whether an increase in purported VoIP traffic from any particular carrier is legitimate or not.

Rural Carrier Carve-Out. Perhaps the most cynical aspect of Level 3's petition is its exclusion of traffic bound for rural carriers from the scope of relief requested. In the first place, there is no policy justification for such an exclusion. Large ILECs depend on access charges (especially intrastate access charges) to support universal service just as rural carriers do. In any

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[28] *See* Presentation on Originating Line Information, attached to letter from John T. Nakahata, Counsel for Level 3 Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 03-266 and 04-36 (Sept. 24, 2004).

event, while this exclusion was undoubtedly designed to temper rural opposition to Level 3's petition, Level 3 has proposed no explanation as to how this carve-out could actually be implemented.

In most cases, carriers such as Level 3 do not interconnect directly with rural carriers. Instead, to exchange traffic with rural providers, they rely on meet-point access services from non-rural ILECs or, for local traffic, transit services from non-rural ILECs. If Level 3's petition were granted, Level 3 and similar carriers would presumably deliver their VoIP-to-PSTN traffic to the ILECs' local interconnection trunks, rather than their access trunks. There would be no clear mechanism -- and Level 3 certainly points to none -- for identifying and separating out any "access" traffic ultimately bound for the customers of rural ILECs and subjecting it alone to access charges.[29] And for the reasons described above regarding PSTN-to-VoIP traffic, neither rural LECs nor the non-rural ILECs would be able to reliably identify VoIP-to-PSTN traffic in order to route or rate it differently. Thus, most VoIP-to-PSTN traffic would be routed and rated as local traffic and rural ILECs would not receive access charges for that traffic.[30] In short, the

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[29] In theory, Level 3 could be required to establish separate access trunks with the ILEC just for rural-LEC-bound VoIP traffic, or even direct connections with each rural carrier. But no Commission rule requires that result, nor is it clear how any ILEC would have the information necessary to police it.

[30] Level 3 has suggested that VoIP providers will rely on traditional IXCs to deliver VoIP-to-PSTN traffic to rural ILECs. Letter from John Nakahata, Counsel for Level 3, to Marlene Dortch, FCC, WC Docket 03-266, at 3 (Jan. 24, 2005). While this may occur in some limited circumstances where it *might* be possible, it is far more likely that VoIP providers will rely on their existing relationships with CLECs to avoid access charges to the greatest extent possible, rather than entering new relationships with IXCs to pay access charges, for the delivery of VoIP-to-PSTN traffic to rural ILECs. Moreover, there is certainly no rule in place that specifically *requires* a VoIP provider to enter a relationship with an IXC to deliver traffic to a rural ILEC. Thus, the Commission cannot rely on Level 3's suppositions about what *might* happen to ensure that rural ILECs receive the access charges they are owed.

rural carve-out that Level 3 proposes cannot be reliably implemented and cannot save its petition: as a practical matter, rural carriers would end up in precisely the same situation as non-rural ILECs – deprived of their ability to collect access charges.

4. The Level 3 Petition Would Create a Serious Risk of Disruption to Reliable and Affordable Universal Service.

A fatal flaw in Level 3's petition is that the relief it seeks would have a major destabilizing effect on the PSTN and would jeopardize the availability of universal, affordable communications service. The PSTN remains critical to communications in this country. While new VoIP and other IP-enabled services promise a revolution in the telecommunications industry, the PSTN remains the network on which the vast majority of Americans rely for their basic communications. And Americans that do not yet enjoy the benefits of broadband and the Internet may have no option other than the PSTN. Continued universal service over the PSTN is thus critical to the public interest in having "rapid, efficient, Nation-wide, . . . wire . . . communication service with adequate facilities at reasonable charges."[31] Rather than advancing the public interest as section 10 requires, the petition would seriously undermine it.

It is well established that access charges -- particularly intrastate access charges -- are an important source of implicit support for universal service.[32] While the Commission is committed

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31 47 U.S.C. § 151.

32 *See, e.g., Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982, 15996 ¶ 31 (1997) (*Access Charge Reform Order*) ("By providing incumbent LECs with a stream of subsidized revenues from certain customers, the system [of implicit access charge subsides] allows regulators to demand below-cost rates for other customers, such as those in high-cost areas."); Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, *Federal-State Joint Board on Universal Service*, 18 FCC Rcd 22559, 22571 ¶ 22 & n.55 (2003) ("*Universal Service Remand*

to moving away from implicit support, as section 254 of the Act requires,[33] it cannot lawfully achieve that goal by abruptly eliminating access charges on an entire, growing, class of traffic; if it eliminates those charges, it must simultaneously provide carriers with explicit subsidies to maintain universal service. As the Commission itself has recognized, "sudden radical change" in the implicit support provided by access charges could "destabiliz[e]" the PSTN.[34] This destabilization would result because the elimination of such support "jeopardiz[es] the source of revenue that . . . has permitted the incumbent LEC to offer service to other customers, particularly those in high-cost areas, at below-cost prices."[35]

The Commission accordingly has recognized that reductions in the implicit support derived from access charges must be coupled with a corresponding adjustment allowing carriers

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Order") ("About half the states report setting intrastate long distance access charges above cost to subsidize basic local service."); *id.* ("substantial amounts of universal service support [are] built into most state rate designs."); Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd. 9610, 9623 ¶ 31 (2001) ("*Intercarrier Compensation NPRM*") (noting that "in order to encourage universal service, this Commission and state regulators historically set access charges above cost")

33 47 U.S.C. § 254(b)(5).

34 *Access Charge Reform Order* at 15998 ¶ 35 (arguing that an approach that balanced access charge reform with a move to explicit universal support would "promote the public welfare . . . while establishing a secure structure for achieving the universal service goals established by law").

35 Sixth Report and Order in CC Docket Nos. 92-262 and 94-1 Report and Order in CC Docket No. 99-249 Eleventh Report and Order in CC Docket No. 96-45, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long Distance Users; Federal-State Joint Board on Universal Service*, 15 FCC Rcd 12962, 12972 ¶ 24 (2000) ("*CALLS Order*"). *See also Access Charge Reform Order* at 15987 ¶ 9 (noting that "eliminating [implicit support mechanisms] all at once might have an inequitable impact on the incumbent local exchange carriers.").

to recoup that same support in some other manner.[36] As the Commission has explained, "because of the role that access charges have played in funding and maintaining universal service, it is critical to implement changes in the access charge system together with complementary changes in the universal service system."[37] But Level 3's petition would radically reduce implicit support for the PSTN in connection with an entire class of traffic without even suggesting an alternative mechanism local exchange carriers could substitute to continue to fund universal service.

Contrary to Level 3's assertions, this is no small problem. The amount of implicit support Level 3's petition would divert from the PSTN is substantial. To begin with, VoIP minutes are increasing steadily.[38] A recent study by the Telecommunications Industry Association observes that "the number of VoIP access lines jumped to 6.5 million in 2004 from 3.8 million in 2003" and "is expected to expand rapidly, rising to and estimated 26 million by 2008."[39] The number of support dollars diverted from the PSTN will be more and more significant over time if reciprocal compensation replaces access for VoIP traffic. And that loss

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[36] *See, e.g., Intercarrier Compensation NPRM* at 9654-55 ¶ 124 (recognizing the need to study "how any new intercarrier compensation regime . . . will impact the collection of universal service contributions"); *CALLS Order* at 13039 ¶ 185 (recognizing the obligation to "provide explicit support to replace the implicit universal service support in interstate access charges" if such charges are reduced.).

[37] *Access Charge Reform Order* at 16142 ¶ 367. *See also* Seventh Report and Order and Thirteenth Order on Reconsideration in CC Docket No. 96-45, Fourth Report and Order in CC Docket No. 96-262 and Further Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service; Access Charge Reform*, 14 FCC Rcd 8078, 8138 ¶ 128 (1999).

[38] *See, e.g.*, "Report: VoIP Will Cut Profits of Incumbent Telcos by 22%-26%," Telecommunications Daily, Jan. 12, 2005.

[39] *TIA's 2005 Telecommunications Market Review and Forecast*, Press Release (Feb. 1, 2005).

will grow even larger given the artificial regulatory advantage Level 3's petition would create for VoIP traffic. As explained in section 5 below, if Level 3's petition were granted, more long distance traffic would migrate from traditional PSTN-based services to VoIP as a result of the artificial pricing advantage associated with VoIP's lower-priced intercarrier compensation regime. That result would not only unfairly discriminate against PSTN-based carriers that pay their share of access charges and would also further decrease universal service support for the PSTN to the detriment of the public at large.

One logical response to this "death spiral" would be to reform universal service by overhauling the fund, increasing the size of the fund, or creating a new, targeted fund. Indeed, SBC and Level 3 have both advocated the latter approach in connection with the transition to bill-and-keep proposed in the ICF Plan. But obviously no such fund can be created in the context of this forbearance petition. And in the absence of such a fund or some other mechanism, the access charge requirements with respect to IP-PSTN traffic remain very much "necessary to ensure that" the charges imposed on PSTN-based customers are just and reasonably and "necessary for the protection of consumers" who rely on the PSTN for reliable, ubiquitous service.[40]

This further confirms the folly of Level 3's proposal to reform *some* aspect of intercarrier compensation in isolation of all the other interrelated intercarrier compensation and universal service issues. The problems raised by intercarrier compensation with respect to IP-PSTN traffic are real ones, and the Commission must address the universal service challenges created by the growing transition to VoIP. But it must do so in a rational, comprehensive manner in which all

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[40] 47 U.S.C. §§ 160(a)(1), (2).

the puts and takes can be considered at once. The Commission may not, as Level 3 requests, blind itself to the providers and consumers who continue to rely on the PSTN today (and will do so for the foreseeable future), thereby giving VoIP providers an unjustified windfall. In short, in the absence of comprehensive intercarrier compensation reform, the Commission must reject the petition. The piecemeal rule change Level 3 proposes would create a massive opportunity for regulatory arbitrage at odds with the Commission's goal of unifying and simplifying intercarrier compensation. Exacerbating a problem just as the Commission is about to embark on addressing it would seriously thwart, not serve, the public interest.

Accordingly, the Commission should reject Level 3's proposal and make clear that, under existing rules, access charges apply to IP-PSTN traffic in the manner specified in carriers' access tariffs. VoIP providers that use the PSTN would therefore be required to contribute to its support, just like PSTN-based IXCs and wireless long distance carriers. And the Commission should then promptly address the intercarrier compensation issues raised by the transition to VoIP traffic in a more comprehensive fashion that avoids the distortions that Level 3's petition would create. As described above, in the ICF plan, SBC -- along with Level 3 and others -- has laid out a roadmap for such reform, which envisions a migration to bill and keep and the reform of universal service support and contribution obligations.[41] The Commission should reject Level 3's petition, and proceed with its pursuit of a more holistic approach that would bring long-awaited stability to the industry as a whole.

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[41] As noted above, SBC has proposed in the *IP-Enabled Services* proceeding that in the shorter term, the Commission adopt a transitional intercarrier compensation regime for all IP-enabled traffic based on federal access charges. This approach minimizes intrastate access while ensuring sufficient support for the PSTN during the transition to more permanent intercarrier compensation reform.

5. By Exempting Only VoIP Providers from All Access Charges, Level 3's Petition Seeks an Artificial and Arbitrary Regulatory Advantage for VoIP Providers as Compared to Their PSTN-Based IXC and Wireless Competitors.

Level 3's petition is not driven by -- and would not serve -- any valid public interest need. To the contrary, it would formalize and exacerbate the competitive disparity that already exists between VoIP providers and PSTN-based wireless and wireline IXCs. VoIP providers currently enjoy a market advantage that stems at least in part from the fact that they are exempt from many of the regulatory obligations their PSTN-based competitors bear. The petition would arbitrarily expand that advantage by sparing only VoIP providers (and the carriers that serve them) from ever paying access charges for their use of the PSTN. Never having to pay access charges on any traffic would allow VoIP providers to price their services below their PSTN-based competitors solely because of regulatory arbitrage and not because of any technological or service-oriented cost advantage. By contrast, PSTN-based long distance carriers would still have to pay access charges for their use of the PSTN. The higher costs these competitors would bear would either have to be passed on to customers or absorbed by the carrier, making it that much harder to compete with VoIP providers. And once given this unfair advantage, providers like Level 3 would have strong incentives to maintain their advantage by opposing comprehensive intercarrier compensation reform.

The Commission would flout the standards of section 10, as well as its obligation to issue only well-reasoned decisions, if it gave VoIP providers that arbitrary competitive advantage. Unjustifiable inequities in the intercarrier compensation borne by direct competitors cannot be "just and reasonable" for purposes of section 10(a)(1); nor can imposing costs on PSTN-based

customers alone be said to "protect[]" consumers or the advance the public interest for purposes of sections 10(a)(2) and (3).[42] Even apart from the standards of section 10, a grant of Level 3's petition would be arbitrary and capricious under the Administrative Procedure Act; agencies cannot lawfully subject similarly situated parties to gross asymmetries in regulatory treatment without a persuasive justification.[43] Finally, granting Level 3's petition would directly conflict with the Commission's own determination that "any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. . . . [T]he cost of the PSTN should be borne equitably among those that use it in similar ways."[44] The Commission should remain faithful to this fundamental principle of fairness by rejecting Level 3's petition and moving forward expeditiously with comprehensive intercarrier compensation reform that benefits *all* segments of the communications industry together.

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[42] *See* 47 U.S.C. § 160(a).

[43] As the DC Circuit has long held, the APA requires invalidation of an agency's unjustified decision to "treat[] similarly situated parties differently." *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (citing cases); *see also* 5 U.S.C. § 706(2)(A).

[44] *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 at ¶ 61 (released March 10, 2004).